

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lexington County
Court of General Sessions

Honorable Knox McMahon, Circuit Court Judge

Case No. 2010-GS-32-1876

Lexie Dial, III

Appellant,

V.

State of South Carolina,

Respondent.

Final Brief of Appellant

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial judge erred in ruling that Henry Dukes had authority to arrest Lexie Dial as a U.S. Marshall under S.C. Statute 23-1-220 or as a citizen pursuant to S.C. Code 17-13-10?
2. Whether the trial judge committed reversible error by refusing to allow defense counsel to impeach the state's lead investigator, Detective Eric Russell, with evidence of his deceit and bias involving a female solicitor assigned to Mr. Dial's case?
3. Whether the trial judge committed reversible error by denying defense counsel's motion for a mistrial after the deceased child's mother, Misti Richards, brought a heart-shaped bronze urn with her up to the witness stand in view of the jury, when this act was extremely prejudicial to Mr. Dial?
4. Whether the trial judge committed reversible error by allowing into evidence gory and overly prejudicial autopsy photographs of five-month old Joshua Dial's brain (known as state's exhibits 7, 8, and 86) as shown with his scalp pulled down over his face, when such evidence was not necessary and its prejudicial impact far exceeded its probative value?
5. Whether the trial judge committed reversible error in refusing to admit into evidence defense exhibits #2 and #3—death certificates on Joshua Dial--when these exhibits were reports generated by forensic pathologist Janice Ross, and documented her about-face as to cause of death after she spoke with the Coroner?
6. Whether the trial judge committed reversible error in sentencing Mr. Dial to the maximum sentence allowed of life imprisonment for Homicide by Child Abuse under S.C. Code Section 16-3-85 (d) without properly considering the aggravating and mitigating circumstances in Mr. Dial's case?

STATEMENT OF FACTS

Introduction:

On January 19, 2010, Joshua Dial, a five-month old boy, was gravely injured due to a head injury. Joshua was at his home with his father, Lexie Dial, III. When Joshua began having breathing problems, Lexie tried CPR, but the child continued to struggle for breath, so Lexie went to a neighbor's home to call his father, Lexie Dial, Jr., who came to the home and tried CPR also. When CPR failed to help Joshua, Lexie, Jr., called 911 and EMS came to the home. Joshua was transported first to Lexington Medical Center and then to Richland Memorial Hospital, where he died.

Medical Treatment for Joshua and Expert Testimony for the State:

Joshua was taken to Lexington Medical Center. At Lexington, Joshua was treated by Dr. Wesley Shuler. Dr. Shuler is a specialist in emergency medicine. (R. pp. 291, lines 9-15). Joshua went into cardiac arrest. Dr. Wesley had a history of Joshua being dropped on a coffee table, which "was consistent with subdural hematoma." (ROA at 298, lines 16-22). Dr. Wesley testified that the bilateral bleeding and a subdural hematoma could have been caused by being dropped on a coffee table. (R. pp. 298-299). Dr. Wesley opined that a small 2-3 inch bruise to the back of Joshua's head could have been caused by Joshua's head striking an object. (R. pp.. 305-A, line 4- P. 305-B, line 5).

Joshua was transported to Richland Memorial Hospital, where he was treated by Dr. Sarah Webb-Wood, a pediatric resident at the time. (R. pp.. 313, line 20- P. 315, line 25). Dr. Webb testified Joshua was brain dead when she saw him, had no spontaneous movement, was lifeless, cold, and his pupils were fixed and dilated. (R. pp. 316-319).

Joshua had bleeding on both sides of his brain and a skeletal survey was ordered to determine whether prior injuries existed. (R. pp. 321, line 4-p. 322, line 20). The volume of blood in Joshua's eye area was huge. Joshua was placed on Dopamine to elevate his blood pressure. (R. pp. 324, lines 6-10).

Bleeding was a serious problem, as Joshua was found to have coagulation problems, or coagulopathy, which can result in continued bleeding. (R. pp. 336, line 6-21). Additionally, Dr. Webb-Wood testified CPR can cause hemorrhaging just from the pressure it exerts and a fall, in and of itself, can also cause retinal pressure. (R. pp. 338, line 10-pp. 339, line 8). Dr. Webb-Wood's final diagnosis was traumatic brain injury secondary to accidental trauma. (R. pp. 332, lines 12-13).

Dr. Edward Cheeseman, an Ophthalmologist, also treated Joshua at Richland Memorial Hospital. He found numerous hemorrhages in Joshua's eyes and found he suffered from retinopathy, caused by "back and force (sic) acceleration," or "from a fall," though the falls are usually accompanied by crushing type injuries of the skull. (R. pp. 404, lines 15-23). Dr. Cheeseman opined a fall with Joshua hitting his head on a table was unlikely without a crushing skull injury. (R. pp. 412, lines 19-24). Dr. Cheeseman did not know Joshua had been given Dopamine to increase his blood pressure, that he suffered from coagulopathy which hampered his ability to clot, nor that untrained people performed CPR, which can cause hemorrhages even when performed correctly, on Joshua. (R. pp. 418, line 18- pp. 421, line 13). Dr. Cheeseman's diagnosis was shaken-baby syndrome. (R. pp. 416, line 20-pp. 417, line 5).

Dr. Greta Harper also treated Joshua while he was at Richland Memorial Hospital. Dr. Harper is a pediatric critical care specialist. (Tr. P. 444, lines 2-3; ROA at __).

Joshua was brain dead when she saw him. (R. pp. 454, lines 9-1). Dr. Harper did not know Joshua received Dopamine to elevate his blood pressure, nor did she know a skeletal survey was performed showing no prior injuries, and she did not review Joshua's post-mortem reports. (R. pp. 475, line 4-P. 480, line 19). Dr. Harper conceded there is no way to date a hemorrhage and that an injury, seemingly mild at first, could later result in death. (R. pp. 482, lines 15-18). Dr. Harper opined the cause of death was "shaken baby." (R. pp. 458, lines 10-11).

Dr. Janice Ross, a forensic pathologist, testified as to Joshua's cause of death. Dr. Ross saw a small bruise near Joshua's chin, and subdural and subarachnoid hemorrhaging. (R. pp. 577, lines 7-11; pp. 581, lines 13-16). She observed significant bleeding in the subdural area. Her cause of death determination was initially that Joshua's head hit an object or a surface (R. pp. 586, lines 10-11; 589, lines 7-19), but later, *after* she spoke with the Coroner, was changed to either that Joshua's head hit an object or something hit Joshua's head (R. pp. 591, lines 6-8), with the cause of death being subdural hemorrhage due to blunt force trauma to the head or from an object hitting his head. (R. pp. 591, line 19-P. 592, line 4). Dr. Ross testified she could not rule out more than one injury as leading to death. (R. pp. 592, lines 12-14).

On cross-examination Dr. Ross conceded she was unaware that Joshua suffered from coagulopathy (R. pp. 575, lines 21-24, P. 592, line 23-P. 593, line 3), and that this condition could lead to continued bleeding for a "long period of time." (R. pp. 593, lines 4-17, P. 596, lines 11-17). Dr. Ross was also unaware that Joshua had been administered Dopamine or epinephrine, which are blood thinners or that Joshua had a collapsed lung. (R. pp. 594, lines 9-24).

The defense was prevented from entering into evidence the written cause of death findings of Dr. Ross. Dr. Ross's reports, marked as Defendant's exhibits 2 and 3, were disallowed into evidence on the basis that these exhibits would "unduly" highlight the apparent change in cause of death before Dr. Ross spoke with the Coroner and the cause of death she listed after her discussion with the Coroner. (R. pp. 983, line 20-P. 984, line 6). The defense argued these exhibits would assist with the defense, which was essentially that Joshua's injuries were sustained when he and Lexie fell onto a coffee table. Dr. Ross' initial determination of cause of death listed in exhibit #2 (that Joshua's head hit an object) supported the defense's theory. (R. pp. 842, line 15-P. 844, line 21; P. 973, line 20-P. 974, line 7).

The trial judge did admit into evidence three photographs of Joshua's bloody scalp and tissue. (R. pp. 569, lines 13-17). This was done over the strong objection of the defense on the basis that the photos were shocking and gross. (R. pp. 552, line 7-P. 554, lines 13-19). The trial judge ruled the photos would assist Dr. Ross in that they "may" indicate the "force or violence" in which the injuries to Joshua occurred. (R. pp. 569, lines 7-17).

The sixth and final doctor to testify for the state was pediatrician Susan Luberoff. (R. pp. 739, line 10). Dr. Luberoff was called in to assist with Joshua by Dr. Wood. Dr. Luberoff opined Joshua had non-accidental blunt force trauma, with extensive retinal hemorrhaging. (R. pp. 749, line 8-P. 750, line 11). She did not believe the injuries could have been accidentally caused, but conceded that the pathologist was the expert best-suited to determine cause of death. (R. pp. 786, lines 10-19).

Lay Testimony by Joshua's mother, Misti Richard:

Misti Richard, Joshua Dial's mother, testified for the state. As she approached the witness stand, Misti carried a bronze, heart-shaped urn containing Joshua's ashes. (R. pp. 498, line 7-line 19; P. 502, line 10-23). The jury was sent out of the courtroom and the defense moved for a mistrial due to the extremely prejudicial display of the urn having been placed on a table within eye-shot of the jurors and for intentionally using this ploy to sway the jurors to convict out of sympathy. (R. pp. 499, line 16-25). The judge denied these motions, but agreed to give a general curative instruction. (R. pp. 506, line 12-P. 507, line 14).

Misti and Lexie met when he was a sixteen year-old high-school student and she a twenty year old dancer. (R. pp. 511, line 23; P. 541, lines 2-12). After Lexie's mother died, he and Misti lived together and received social security which paid the bills. (R. pp. 541, line 17-P. 543, line 2). Joshua was born and Lexie dropped out of high-school, enrolled in internet school, and took on the role of full-time parent. (R. pp. 542, line 5- P. 543, line 25).

The day Joshua died began uneventfully enough. (R. pp. 521, lines 18-24). Lexie and Misti woke up, helped Joshua through his morning routine, ran out to buy cigarettes and stayed around home in their trailer. (R. pp. 522, line 17-P. 525, line 5). Misti went to work around 4:00 p.m. and was there until Richland County deputies came to get her from Heartbreakers club around 10:30. (R. pp. 528, line 7-21).

When Misti arrived at the hospital, Lexie was really tired and looked like a "Zombie." (R. pp. 532, lines 8-15). Lexie denied intentionally harming Joshua. (R. pp. 532, lines 19-24). Misti said Lexie gave a couple different descriptions of what had happened to Joshua, saying either that he slipped and fell or tripped and fell. Misti said

she felt like a “Zombie” and nothing made sense to her that night. (R. pp. 533, lines 17-19).

While Misti had developed doubts about Lexie’s innocence by the time of trial, one thing is clear: based upon her prior knowledge of Lexie and his parenting, Misti’s first reaction was absolute disbelief that Lexie would ever have intentionally harmed Joshua. In fact, so convinced was she that Lexie would never intentionally harm Joshua, Misti began researching to assist with his defense. (R. pp. 546, lines 6-25). Moreover Misti testified Lexie had tried to be a good father to Joshua. (R pp. 546, lines 23-25).

Law Enforcement and the Questioning and Arrest of Lexie Dial:

Lexington County major crimes investigator Eric Russell was in charge of investigating Joshua’s death. Russell spoke with doctors at the hospital and then called his colleague at the Lexington County Sheriff’s Department, Luis Riviera, who presented the information to a magistrate and a warrant for great bodily injury to a child was issued. (R. pp. 134, lines 2-22). The first warrant was issued prior to Joshua’s death, and later withdrawn and a new warrant for homicide by child abuse was issued. (R. pp. 124, lines 3-8).

Lexie Dial was arrested by Henry Dukes, a Lexington County law enforcement officer with the U.S. Marshall’s fugitive task force. The arrest occurred in Richland County at the Richland Memorial Hospital. The defense challenged Dukes’ authority to arrest Lexie. Initially, the state responded to this challenge by relying on S.C. Statue 23-1-212. (R. pp. 677, line 8-P. 678, line 21). Later, the Court opined that, even if Dukes did not have authority to arrest Lexie as a U.S. Marshall with state-wide jurisdiction, then Dukes still had authority to arrest Lexie as a “citizen” under S.C. Code 17-13-10, the

citizen's arrest statute. (R. pp. 692, line 21-P. 693, line 5). The defense objected to this ruling and challenged Dukes' authority to arrest Lexie, and the judge overruled the objection.

After Dukes arrested Lexie and transported him to the Lexington County Detention Center, Investigator Russell then questioned Lexie and obtained a statement from him, entered into evidence, over the defense's objection, as State's exhibit #63. (R. pp. 705, lines 10-15). This statement was very damaging to the defense, as it contained an admission of Lexie shaking Joshua. (R. pp. 717, lines 11-25).

Lexie testified he told Russell what happened twice. (R. pp. 868, lines 3-11). Lexie's account was that he was carrying Joshua, tripped over a steam cleaner in the living room and crashed through a coffee table and landed on top of Joshua. (R. pp. 856, line 22-P. 858, line 25). Lexie did admit to shaking Joshua but only after he was gasping for breath, and not in a manner that would have caused injury. (R. pp. 860, lines 6-8). Russell told Lexie that his version of events could not be true. (R. pp. 868, lines 5-21). Lexie said he eventually told Russell what Russell wanted to hear so that Russell would "help" him. (R. pp. 869, line 13-P. 871, line 9). Lexie further testified Russell told him that his cooperation would help him. (R. pp. 869, line 21-P. 870, line 3).

Defense counsel sought to question Russell about his relationship with the female assigned Solicitor who was assigned to prosecute Lexie's case. Debra Moore, who had tried other child abuse homicides for the Lexington Solicitor's Office and had worked with Russell in other such cases, was assigned to the case. However, in October 2010, Russell and his then-wife, Lexington Sheriff's Office deputy Ashley Russell, separated due to the revelation that Russell was having a romantic relationship with Moore. (R. pp. 133).

Russell left his wife because of the relationship with Moore. (R. pp. 133). Ultimately, Lexie's case was conflicted from the Eleventh Circuit Solicitor's Office to the South Carolina Attorney General's Office due to the personal relationship between Moore and Russell.

Defense counsel moved *in limine* to cross-examine Russell on his relationship with Moore. (R. pp. 99, line 22-P. 100, line 6). While the relationship came to light in October, 2010, it is clear that Russell and Moore knew one another and had personal contact well before this time and certainly at the time Russell was investigating Lexie's case and questioning him. (R. pp. 130, lines 6-25 (unsealed by Order of this Court)). Obviously, any relationship of a weight significant enough to lead to a divorce would also be significant enough to encourage and promote personal bias, and defense counsel sought to discredit Lexie's statement taken by Russell, thus making Russell's credibility a critical issue to the defense.

The Attorney General argued that the connection between Russell's relationship with Moore and Russell's conduct during Lexie's questioning was "just too tenuous to make, regardless of the time period." (R. pp. 178). The Court ruled that evidence of Russell's bias in favor of the prosecution was inadmissible under rule 608(c), SCRE.

The Sentencing of Lexie Dial, III:

Lexie Dial, III, was found guilty of homicide by child abuse. Homicide by child abuse is a statutory creation and has specific provisions related to sentencing, which requires the sentencing judge to consider any aggravating and/or mitigating circumstances. After Lexie was found guilty of homicide by child abuse, the trial judge did not conduct any analysis of the mitigating and aggravating factors during his sentencing and sentenced

Lexie to life in prison.

ARGUMENTS

1. The trial judge erred in ruling that Henry Dukes had authority to arrest Lexie Dial as a United States Marshall under S.C. Statute 23-1-220 or as a citizen pursuant to S.C. Code 17-13-10.

The trial judge erred in ruling that Henry Dukes had authority to arrest Lexie Dial pursuant to S.C. Code Section 23-1-212. This statute authorizes full-time federal law enforcement officers to assist local law enforcement agencies in South Carolina with making arrests. However, pursuant to 23-1-212(B)(1), the federal officer must act “within the scope of the state or local law enforcement agency’s subject matter and territorial jurisdiction.”

Sergeant Henry Dukes, who is a deputized U.S. Marshall, arrested Lexie Dial, but he did not meet the requirements of S.C. Code Section 23-1-212 for purposes of arresting Mr. Dial in Richland County. Sergeant Dukes was neither a full time Marshall nor authorized to make arrests in Richland County. Richland County had no involvement in the investigation of the case, as the alleged crime occurred in Lexington County and it was Lexington County investigator Eric Russell who asked Dukes to arrest Lexie Dial.

The trial court erred in ruling that Henry Dukes had authority to arrest Lexie Dial pursuant to S.C. Code Section 23-1-212. The judge ruled Dukes was authorized to deal with fugitives, but Dial was not a fugitive. (**R. pp. 689**). The trial judge also ruled Russell’s testimony that Dukes had “state wide” power to arrest was sufficient to establish he had that power, but Russell was clearly wrong about the extent of Dukes’ power. (**R. pp. 689**). Finally, the judge relied upon a memorandum submitted by a paralegal, and entered

into evidence as Exhibit #3, in upholding Dukes' authority to arrest Dial. (R. pp. 692). The trial judge clearly erred and misapprehended the statutory limits of authority conferred upon Sergeant Dukes. Dukes' arrest of Lexie Dial was unlawful.

Notwithstanding the ruling that Dukes had authority to arrest as a U.S. Marshall, the trial judge ruled, in the alternative, that Sergeant Dukes' arrest of Lexie Dial was lawful under S. C. Code Section 17-13-10.

S.C. Code Section 17-13-10, commonly known as the citizen's arrest statute, provides as follows:

Upon (A) view of a felony committed, (B) certain information that a felony has been committed or (C) view of a larceny committed, any person may arrest the felon or thief and take him to a judge or magistrate, to be dealt with according to law.

The trial judge erred in ruling Dukes' arrest of Lexie Dial was proper as a citizen's arrest. As an initial matter, it is important to note that Dukes was acting under color of state and/or federal law. Dukes was a Lexington County law enforcement officer who had special deputization as a federal Marshall. First, no search warrant existed at the time of Dukes' arrest of Lexie Dial and the state never offered any proof that a warrant had even been issued at the time of the arrest. Second, Dukes' knowledge did not fall within the purview of S.C. Code Section 17-13-10, in that he neither saw a felony committed nor had "certain information" that a felony had been committed. Rather, Dukes was given information from Eric Russell who had been given information from doctors. Dukes was called in by Russell because Russell wrongly believed Dukes could make an arrest anywhere and had unfettered, "state-wide" arrest power. Finally, pursuant to the citizen's arrest statute, Dukes' arrest power as a "citizen" only allowed him to arrest a suspected felon and take

him to a "judge or magistrate." Dukes did not take Lexie Dial to a judge or magistrate, he took him to the Lexington County Detention Center to be interrogated and await service of a Lexington County arrest warrant.

The trial court clearly erred in applying the citizen's arrest statute to Sergeant Dukes' conduct in arresting Lexie Dial. Sergeant Dukes was essentially called in to make an arrest that Eric Russell knew he could not make, and Russell called on Dukes to make the arrest based on his mistaken belief Dukes had authority to arrest anywhere in the state. Dukes knew nothing other than what he was told by Eric Russell. Dukes was acting under his apparent authority as a U.S. Marshall. Dukes did not follow the mandate of the citizen's arrest statute embodied in S. C. Code Section 17-13-10. Dukes' arrest of Lexie Dial was unlawful.

The trial court erred in finding Lexie Dial was lawfully arrested. As a result of this ruling, the trial judge admitted into evidence a second statement taken by Detective Eric Russell, which was prejudicial to the defense and tipped the scales in favor of Lexie's conviction. The evidence of a "confession" to Eric Russell was fruit of the "poisonous tree" arrest made by Sergeant Dukes. *Wong Sun v. United States*, 371 U.S. 471 (1963). These combined errors were extremely prejudicial and require that this Court vacate Lexie Dial's conviction and remand his case for a new trial.

2. The trial judge committed reversible error by refusing to allow defense counsel to impeach the state's lead investigator, Detective Eric Russell, with evidence of his deceit and bias involving a female solicitor assigned to Mr. Dial's case.

"Relevant evidence" is evidence having any tendency to make the existence of any fact that is of consequence to the action more or less probable that it would be without the

evidence.” Rule 401, S.C.R.E. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, S.C.R.E. The trial judge is given wide latitude in assessing evidence for its relevance, potential prejudice, and determining its admissibility. On appeal, the trial court’s rulings on admissibility are reviewed with great deference to the trial court and the trial court’s rulings will be reversed only on a showing of abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557 (2002).

Bias, prejudice, and/or motive to lie are relevant issues to be explored during cross-examination of a witness. Obviously, as the witness’ importance to the case goes up, so, too, does the value and/or significance of any potential bias of the witness. Rule 608, S.C.R.E. provides that “anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony. On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness.” *State v. Saltz*, 346 S.C. 114, 131-132 (2001). To exclude evidence under Rule 608, SCRE, a showing must be made that the evidence is “clearly improper.” *State v. Mitchell*, 330 S.C. 189 (1998). No such showing was ever made in this case.

Lexie Dial’s case originated in the Lexington County Solicitor’s Office where it was assigned first assigned to Shawn Graham and then, for reasons not apparent even to the Deputy Solicitor, transferred to then assistant-solicitor Debra Moore. (See sealed Exhibit, letter from Rick Hubbard, dated January 14, 2011). Lexie’s case was investigated by the Lexington County Sheriff’s Department with Detective Eric Russell assigned as lead

investigator. By the time of trial, Lexie's case had been reassigned to the South Carolina Attorney General's Office. The decision to transfer Lexie's case was made after a romantic relationship between Debra Moore and Eric Russell was discovered by Russell's wife, Lexington County Deputy Ashley Russell, from whom he was getting a divorce as a result of his relationship with Moore. (R. pp. 133).

Prior to trial, the defense learned of the romantic relationship between Russell and Moore, as well as the fact that Russell and Moore had worked together on homicide by child abuse cases in the past. Defense counsel learned of the relationship from a letter written by Deputy Solicitor Rick Hubbard, which detailed the events leading up to the case being transferred to the Attorney General's Office. This letter was admitted as a sealed exhibit. (R. pp. 130-133). Based on the evidence of a solid romantic link between the assigned solicitor and the lead investigator, defense counsel believed Russell was biased in favor of the prosecution. Moreover, given Russell's deceit in conducting an illicit relationship with his also then-married colleague—a fact that came to light solely because his wife discovered certain text message exchanges between Russell and Moore—counsel believed Russell's credibility and track record for honesty was shaky, at best.

Counsel raised the issue of Russell's potential bias in an *in limine* hearing. Russell admitted the relationship with Moore (R. pp. 131, lines 1-5), the fact that it resulted in his marriage ending in divorce (R. pp. 133, lines 11-14), the fact that he and Moore had worked together in trying another homicide by child abuse case in June, 2010 (R. pp. 130, lines 10-21), but denied he had "feelings" prior to October, 2010 (R. pp. 132, lines 6-18). In essence, Russell testified he had no bias toward Moore in January, 2010 when he questioned Lexie Dial. The trial judge ruled that evidence of Russell's adulterous

relationship with Moore was neither relevant nor a proper area for cross-examination under Rule 608, S.C.R.E. Defense counsel objected to this ruling and wanted to question Russell as to his bias. (R. pp. 175).

The trial judge clearly erred in preventing the defense from fully cross-examining Russell on his relationship with Moore as it was relevant to his bias. *State v. Mitchell, infra*; Rule 608, SCRE. As a preliminary matter, it is important to note that the Eleventh Circuit Solicitor's Office viewed the relationship between Moore and Russell of such a nature and magnitude that Lexie's case was removed from their office and sent it to the Attorney General's Office for prosecution. Conflicts of interest are not uncommon in the practice of law, especially in large offices that serve as virtual clearing houses for an entire type of caseload, like criminal prosecution. For this reason, Lexie's case was reassigned from Debra Moore to Dayton Riddle. However, as set forth in Hubbard's letter of January 14, 2011, this decision was reconsidered and the decision was made to have the case completely removed from the office. This uncommon decision underscores the seriousness of the breach in protocol when a prosecutor and an investigator become romantically involved while working on cases together.

Eric Russell's testimony was critical to the state's case. First, the defense challenged the statement Russell took from Lexie Dial. (R. pp. 101, lines 20-22). Second, Lexie Dial testified Russell essentially bullied and pressured him into changing his account to match what Russell wanted him to say. (R. pp. 868). Third, the statement taken by Russell bolstered the "shaken baby" theory upon which the prosecution urged the jury to convict, and this was especially important because the medical experts did not agree and gave inconsistent and conflicting diagnoses for cause of death. Finally, there was

absolutely no evidence that Lexie Dial committed prior abuse of Joshua Dial or had done anything harmful to the child, which made the state's theory more difficult to prove, especially in light of Misti Richards' testimony that she could not believe Lexie Dial would ever harm Joshua and that Lexie had tried to be a good father to Joshua. (R. pp. 546).

Eric Russell's relationship with Debra Moore was relevant to both his bias and his truthfulness. Bias and deceit are the key ingredients of any challenge to a statement obtained by law enforcement, as this claim requires the defendant to impugn the methods by which a statement was obtained and the only way to do that is to show that law enforcement pressured the defendant to make a false statement that fit the picture law enforcement was trying to paint in furtherance of the defendant's conviction.

Finally, the testimony of Eric Russell as to the date he developed "feelings" for Debra Moore is suspect, if not completely lacking in credibility. Russell's *in camera* testimony that he developed feelings for Moore in October, 2010, seemingly overnight, is preposterous. Russell and Moore had been working together on criminal cases for months, if not years, and apparently were on a "child abuse" committee together, leading to Moore presenting Russell with a "plaque" sometime in November-December, 2010. Moreover, Deputy Solicitor Hubbard, after discussions with members of the Lexington County Sheriff's Department, admitted "Debra (Moore) was not truthful as to the nature of her relationship with Eric." (See sealed Exhibit, Hubbard letter to Floyd, dated January 14, 2011).

In conclusion, the trial judge committed reversible error by refusing to allow defense counsel to impeach the state's lead investigator, Detective Eric Russell, with evidence of his deceitful conduct involving a female solicitor assigned to Mr. Dial's case,

which resulted in the case being conflicted to the Attorney General's Office for prosecution and caused the marital break-up of Detective Russell and his then spouse, when Russell's testimony was extremely damaging to Mr. Dial. Russell's relationship with Moore and the apparent deceit with which it was carried on was highly relevant to his credibility as a witness and his bias toward the prosecution. This Court should reverse Lexie Dial's conviction and remand for a new trial.

3. The trial judge committed reversible error by denying defense counsel's motion for a mistrial after the deceased child's mother, Misti Richards, brought a heart-shaped bronze urn with her up to the witness stand in full view of the jury, when this act was extremely prejudicial to Mr. Dial.

"Relevant evidence" is evidence having any tendency to make the existence of any fact that is of consequence to the action more or less probable that it would be without the evidence." Rule 401, S.C.R.E. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, S.C.R.E. The trial judge is given wide latitude in assessing evidence for its relevance, potential prejudice, and determining its admissibility.

Misti Richard, Joshua's mother, cried hysterically at the beginning of trial; so much so that defense counsel moved for a mistrial, which was denied. (R. pp. 229). Misti remained in the courtroom and trial continued. About half way through the trial, Misti was called to testify on behalf of the state. (R. pp. 511). Ms. Richard approached the witness stand and set a 3 x 2 " heart-shaped bronze urn on a table within clear view of the

jurors. (R. pp. 498-502). Defense counsel immediately moved for a mistrial on the basis that Ms. Richards' antics had created irreparable and "severe prejudice" to the defense, and the jury was removed from the courtroom. (R. pp. 498). The trial judge denied counsel's motion.

The act of carrying and displaying a heart-shaped urn with the child's ashes before the jury was clearly an attempt to gain sympathy from the jury and went beyond the edge of what is acceptable courtroom behavior. There is no more emotionally charged criminal case than one that involves the death of a child; in this case an infant, and allegedly at the hands of his own father. Ms. Richards' intent was crystal clear—to let the jury know she was the grieving mother of her dead child and that the child was literally in the courtroom awaiting justice for his own killing. Defense counsel was correct in seeking a mistrial, as no amount of instruction by the court could undo the psychological impact of what the jurors witnessed.

South Carolina courts have recognized the highly prejudicial impact of such displays before. Recently, in *State v. Northcutt*, 372 S.C. 207 (2007), our Supreme Court reversed a death sentence when the Solicitor paraded a baby carriage shrouded in black cloth before the jury during his closing argument. In that case, the Court held that the baby carriage display injected into the jurors' consideration concerns that were not based on the record evidence and its reasonable inferences. Likewise, in this case, the issue was whether Lexie Dial abused his child and thereby caused his death, not whether the child was cremated and carried around in an urn by his grieving mother. This is the type of courtroom theatrics that virtually guarantees the jury will make a decision based on emotion, sympathy or passion, rather than the facts and the law. Under these

circumstances, the trial court clearly erred in denying defense counsel's motion for a mistrial and this Court should reverse Lexie Dial's conviction and remand his case for retrial.

4. The trial judge committed reversible error by allowing into evidence gory and overly prejudicial autopsy photographs (known as state's exhibits 7, 8, and 86) of five-month old Joshua Dial's brain as shown with his scalp pulled down over his face, when such evidence was not necessary and its prejudicial impact far exceeded its probative value.

"Relevant evidence" is evidence having any tendency to make the existence of any fact that is of consequence to the action more or less probable than it would be without the evidence." Rule 401, S.C.R.E. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, S.C.R.E. The trial judge is given wide latitude in assessing evidence for its relevance, potential prejudice, and determining its admissibility.

The trial court erred in admitting into evidence three gory and shocking autopsy photographs. (R. pp. 568-569). Counsel objected that the photographs were much more prejudicial than probative. (R. p. 552). The trial judge then conducted an *in camera* hearing with pathologist Dr. Janice Ross, who testified that the photographs showing Joshua's scalped head and subdural and subarachnoid hemorrhages would assist her testimony. (R. p. 556). The trial judge did not conduct an analysis under 403, SCRE, to determine whether the prejudicial impact of the photos outweighed their probative value. The trial judge simply ruled that the photos would assist Dr. Ross and "may" show force or

violence of the injuries to Joshua. (R. pp. 568-569).

The trial court committed reversible error in admitting the gory and shocking autopsy photographs of Joshua Dial's unsheathed brain. This Court recently found reversible error in cases strikingly similar to those in Lexie Dial's case. In *State v. Collins*, ___ S.E.2d ___, 2012WL469719 (S.C. App.), this Court reversed a conviction due to the admission of gory photos of a dead child who was eaten by dogs. The photos were admitted to assist and corroborate the state's case, including testimony by the state's expert pathologist. The photos were disturbing to view.

This Court contrasted the facts of *Collins* with the earlier case of *State v. Jarrell*, 350 S.C. 90 (Ct. App. 2002), a homicide by child abuse case involving admission of similar photographic evidence. The critical distinction between these two cases was the nature of the disputed issues in the case. Both cases involved child death and both were prone to evoke emotion. However, in *Jarrell*, the state needed the photos to prove motive, time of death and sexual abuse of the victim. In *Collins* the photographic evidence was less necessary to the state, merely serving to corroborate certain portions of expert testimony. The autopsy photographs admitted into evidence in Lexie Dial's case were admitted for reasons similar to those relied upon by the state in *Collins*, in that they were admitted to corroborate the testimony of Dr. Janice Ross, and possibly to show "force" or "violence."

Also of significance to this Court in *Collins* was the fact that the trial judge failed to conduct an analysis under Rule 403, SCRE, to assess whether the evidence was more probative than prejudicial. The same is true in this case, as the trial judge made no mention of the prejudicial impact the photos would have on the defense. Rather, the trial court focused exclusively on the state's reasons for wanting to admit the photographs and

the reasons given by Dr. Ross as to how she would use the photographs during her testimony.

The trial court clearly erred in admitting state's exhibits 7, 8, and 86. The court did not conduct the required analysis under Rule 403, SCRE, in that he failed to perform an assessment of the prejudicial versus probative value of the evidence. *State v. Collins, infra*. Moreover, these photographs were clearly more prejudicial than probative, as they did little more than "assist" the forensic pathologist and added nothing, to the state's case as to the elements of the alleged crime. This Court should reverse Lexie Dial's conviction and remand this case for a retrial.

5. The trial judge committed reversible error in refusing to admit into evidence defense exhibits #2 and #3—death certificates on Joshua Dial--when these exhibits were reports generated by forensic pathologist Janice Ross, and documented her about-face as to cause of death after she spoke with the Coroner.

"Relevant evidence" is evidence having any tendency to make the existence of any fact that is of consequence to the action more or less probable that it would be without the evidence." Rule 401, S.C.R.E. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, S.C.R.E. Introduction of evidence is a matter largely left to the discretion of the trial judge and the appellate court should only reverse this type of decision upon a showing of a "manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429 (2006).

The trial court erred in excluding copies of pathologist Dr. Janice Ross's death

certificate reports, which were conflicting as to Joshua's cause of death and invaluable to the defense claim that Joshua's death was an accident. The conflicting death certificates authored by the same doctor document that Dr. Ross changed her opinion as to the cause of death determination on the amended death certificate after she spoke with the Coroner. Dr. Ross' changed cause of death determination was very helpful to the prosecution, as her newly minted cause of death for Joshua dovetailed perfectly with the state's theory of "shaken baby" syndrome.

The defense argued that the death certificates should be admitted into evidence, but the trial court refused to admit them. Defense counsel argued correctly that the conflicting death certificates would have a "visual impact" on the jury. (R. p. 983). The trial judge excluded copies of the conflicting death certificates, stating that entering copies of the reports into evidence would be "unduly highlighting" their contents. (R. p. 983-984).

The trial court clearly erred and the error was prejudicial. This issue was recently addressed in *McKnight v. State*, 378 S.C. 33 (2008), with the result being that failure to introduce cause of death evidence in a homicide case resulted in a reversal of the defendant's conviction. In *McKnight* the issue arose on post-conviction relief. Trial counsel had elicited information from an autopsy report, but failed to move the report into evidence. Counsel's dereliction was an oversight. The Supreme Court held that the oversight was prejudicial. The Supreme Court rejected the state's argument that the report was cumulative because the doctor had testified as to its contents, finding the report itself was "hard evidence" to "undermine the state's own expert" and "remind jurors of inconsistencies in the state's experts' testimony." *McKnight*, at 54-55.

The issue in Lexie Dial's case is a mirror image of that addressed in the *McKnight*

case. The only difference is the procedural posture, with Mr. Dial's issue preserved for direct appeal and Mr. McKnight's issue having been raised during post-conviction relief. The core issue is whether the trial court can exclude documentary evidence that assists the accused with rebutting the state's case by showing contradictions by the state's expert witnesses who authored the excluded reports. As the *McKnight* Court pointed out, the "autopsy was a powerful piece of documentary evidence that was crucial...because it contradicted the state's theory of the case...(and the state's) own expert authored the autopsy report." *Id.*, at 54.

Joshua Dial's conflicting certificates of death authored by Dr. Janice Ross were relevant evidence, and they were powerful, tangible proof that the state simply failed in its burden of proof that Lexie Dial committed homicide by child abuse. Dr. Ross, as a pathologist, was arguably the expert best qualified to make a determination of the manner of death. That Dr. Ross' first certificate of death listed "head hit object" as the cause of Joshua's death. This cause of death was consistent with Lexie Dial's defense, whereas the second death certificate was in line with the prosecution's theory of the case and was authored during the day after Dr. Ross spoke with the Coroner. No two pieces of paper could better support the defense position than the certificates of death authored by Dr. Ross, and the exclusion of this evidence was clearly both error and prejudicial to Lexie Dial. This Court should reverse Lexie Dial's conviction based on this error.

6. The trial judge committed reversible error in sentencing Mr. Dial to the maximum sentence allowed of life imprisonment for Homicide by Child Abuse under S.C. Code Section 16-3-85 (d) without properly considering the aggravating and mitigating circumstances in Mr. Dial's case.

S.C. Code Section 16-3-85 defines Homicide by child abuse as follows:

(A) A person is guilty of homicide by child abuse if the person:

(1) causes the death of child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

S.C. Code Section 16-3-85(D) provides specific guidelines for the sentencing of a person convicted of homicide by child abuse:

(D) In sentencing a person under this section, the judge must consider any aggravating circumstances including, but not limited to, a defendant's past pattern or child abuse or neglect of a child under the age of eleven, and any mitigating circumstances; however, a child's crying does not constitute provocation so as to be considered a mitigating circumstance.

The trial judge in this case committed error in failing to consider the mitigating and aggravating circumstances in Lexie Dial's case. The record clearly demonstrates there were no aggravating circumstances in Lexie's past history with his son Joshua Dial or any other child under the age of eleven. (**R. p. 992, lines 6-7**). In fact, the testimony presented clearly refutes any claim that Joshua Dial was ever abused or neglected at any point in his life by Lexie Dial, or anyone else.

The trial judge mentioned taking into account Lexie Dial's lack of criminal history and lack of any prior instances of child abuse on his part. (**R. p. 992, lines 1-16**). The judge mentioned Lexie Dial's family support and the lack of any attack upon his character. (Id.) The judge then mentioned taking into account the severity of Joshua's injuries and what the judge perceived to be as Lexie's "lack of concern" for Joshua, decision to call his father, rather than 911, and lack of corroborating photographic evidence as to Lexie's

version of events. (R. p. 993). The judge noted the doctors repeatedly said “shaking” and that children are resilient. (R. p. 994). Finally, despite Lexie Dial’s on-the-record apology, the trial judge said he saw not “one ounce of remorse” from him. (R. p. 994). Finally, the judge told Lexie he had let his family and Joshua “down” and sentenced him to life in prison. (R. p. 994).

It is clear from the trial judge’s comments during sentencing that he did not accord any weight to the mitigating factors present in Lexie Dial’s case. While mentioning Lexie’s lack of criminal record for violence and no history of child abuse, the trial court clearly did not factor these mitigating elements into his sentence, as he sentenced Lexie Dial to the most severe punishment allowed by law.

Conspicuously absent from the trial judge’s sentencing remarks is any indication that he engaged in a consideration or weighing of the mitigating and aggravating factors. At a minimum, the trial judge was required to acknowledge his duty to consider these factors and explain which ones he took into consideration. The trial judge’s failure to do so was error and it is clear from the sentence that the trial judge did not follow his duty under the sentencing provision of S.C. Code Section 16-3-85 (D). The trial judge’s error requires that this Court vacate Lexie’s sentence and remand his case for a new sentencing.

CONCLUSION

Based on the foregoing facts, law and argument, this Court should reverse Appellant's convictions and sentence.

Respectfully submitted,

H. Wayne Floyd, Esquire
Attorney for Appellant.

This ___ day of _____, 2013.

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Lexington County
The Honorable L. Knox McMahon, Circuit Court Judge**

THE STATE,

Respondent,

vs.

LEXIE DIAL, III,

Appellant.

Certificate of Compliance

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifies, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 263 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 27th day of January, 2013.


H. WAYNE FLOYD, ESQUIRE.

ATTORNEY FOR APPLICANT

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